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No. 08-1358
(CAPITAL CASE)

IN THE

Supreme Court of the United States

BRANDY AILEEN HOLMES,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL ORGANIZATION ON FETAL ALCOHOL SYNDROME AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HARRY R. SILVER
Counsel of Record
KAREN SMITH THIEL
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6453

DAINA BORTECK
AMY GLUCK
SHEEA SYBBLIS
PATTON BOGGS LLP
The Legal Center
One Riverfront Plaza
Newark, NJ 07102
(973) 848-5600

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the National Organization on Fetal Alcohol Syndrome ("NOFAS" or "*amicus*"), moves for leave to file the accompanying brief as *amici curiae* in support of the petition for writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has denied consent.

Amicus curiae, NOFAS, a 501(c)(3) non-profit public health advocacy organization that strives to raise awareness of the risks associated with alcohol consumption during pregnancy and to support individuals and families living with Fetal Alcohol Syndrome ("FAS"), has a strong institutional interest in having

the Court resolve the issues raised by petitioner concerning whether FAS, which causes a lack of significant adaptive functions, should be considered in addition to IQ score as a mitigating circumstance in Louisiana's death penalty sentencing. NOFAS is not aware of any other FAS cases that have been reviewed by the Court. Accordingly, NOFAS should be granted leave to file the attached *amicus curiae* brief, which establishes the need for review by this Court by demonstrating the deficiencies in Louisiana's death penalty sentencing guidelines insofar as they fail to take FAS into account as a mitigating factor.

Respectfully submitted,

HARRY R. SILVER
Counsel of Record
KAREN SMITH THIEL
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6453

DAINA BORTECK
AMY GLUCK
SHEEA SYBBLIS
PATTON BOGGS LLP
The Legal Center
One Riverfront Plaza
Newark, NJ 07102
(973) 848-5600

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BRIEF FOR THE NATIONAL ORGANIZATION ON FETAL ALCOHOL SYNDROME AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The National Organization on Fetal Alcohol Syndrome ("NOFAS") is a 501 (c)(3) non-profit public health advocacy organization committed to raising the awareness of the risks associated with alcohol

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

consumption during pregnancy and supporting individuals and families living with Fetal Alcohol Syndrome (or "FAS"). NOFAS represents children and adults seeking medical, mental health, education, rehabilitative and other therapeutic services for the spectrum of effects associated with prenatal alcohol exposure. FAS is the leading known preventable cause of intellectual disabilities and neurobehavioral disorders in the developed world affecting as many as 40,000 newborns each year in the United States alone.

Petitioner Brandy Holmes ("Ms. Holmes"), exhibits the hallmark developmental profile of FAS. Although her case is an extreme example of the maladaptive behavior linked to FAS, 61% of adolescents and 58% of adults with the disorder encounter the justice system. Twenty-three percent are ultimately confined in a mental hospital and 35% are incarcerated for a crime. Accordingly, NOFAS believes it is extremely important that law enforcement officials, the courts and corrections officers are educated about FAS, and that the disability be appropriately considered during sentencing and confinement. This case has important implications for understanding the personality and conduct disorders associated with FAS-induced brain damage, the vulnerabilities of affected individuals, the opportunities for intervention across systems of care, and the ultimate consequences of FAS in society. Ms. Holmes' case also has profound implications within the FAS field, and beyond, regarding the standards of decency for the treatment of the functionally disabled.

SUMMARY OF ARGUMENT

This Court should accept the petition for a writ of certiorari to review the Louisiana Supreme Court's

judgment in this case because that court's proportionality review failed to consider a necessary mitigating factor. Ms. Holmes suffers from Fetal Alcohol Syndrome, a condition which should have been weighed heavily as a mitigating circumstance in determining whether her death sentence is appropriate. Ms. Holmes' neurodevelopmental, cognitive and adaptive functioning deficits resulting from FAS were not adequately considered as mitigating circumstances. Further, the Louisiana Supreme Court failed to adequately consider Ms. Holmes' disabilities, caused by Fetal Alcohol Syndrome in conjunction with her low IQ, in upholding her death sentence. Finally, the portrayal of Ms. Holmes' behavioral manifestations of Fetal Alcohol Syndrome as aggravating circumstances precluded the necessary consideration of Fetal Alcohol Syndrome as a mitigating circumstance. This result is inconsistent with the rationale of the Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

ARGUMENT

THE LOUISIANA SUPREME COURT'S PROPORTIONALITY REVIEW FAILED TO CONSIDER FETAL ALCOHOL SYNDROME AS A MITIGATING CIRCUMSTANCE IN DETERMINING WHETHER MS. HOLMES' DEATH SENTENCE IS APPROPRIATE.

This case presents an opportunity for this Court to address whether the FAS population faces special risks of wrongful execution, similar to those faced by the mentally retarded population addressed by this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). Ms. Holmes was sentenced to death because FAS was not considered a mitigating factor similar to mental

retardation. In *Atkins*, this Court held that the execution of mentally retarded individuals violates the Eighth Amendment's prohibition against cruel and unusual punishment:

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.

Id. at 306-307. The *Atkins* decision was based upon a recognition of the longstanding principle that the death penalty is reserved for those most deserving of the most extreme and final punishment. 536 U.S. at 319 (citing *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (reversing death sentence because defendant's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder")). In light of *Atkins*, those suffering from disabilities in areas of reasoning, judgment and impulse control cannot be seen as "deserving" of the death penalty.

A. The Neurodevelopmental Deficits Associated With Prenatal Alcohol Exposure And Fetal Alcohol Syndrome, And The Resulting Deficits In Cognitive And Adaptive Functioning, Should Have Been Considered As Mitigating Circumstances In Determining Whether Ms. Holmes' Death Sentence Is Appropriate.

The Louisiana Supreme Court's judgment in this case disregarded the clear fact that Ms. Holmes

suffers from Fetal Alcohol Syndrome and that fact should have been a mitigating factor. Notably, at trial, the State conceded that Ms. Holmes suffers from FAS. Tr. Feb. 16, 2006, 177:1-3. FAS is the most extreme form of a range of conditions within Fetal Alcohol Spectrum Disorder ("FASD"), a term used to describe the adverse effects of prenatal alcohol exposure that lie along a continuum.[2] These effects may include changes in facial features, organic brain damage, and deficits in cognitive and adaptive functioning that have lifelong implications.[3] The terms FAS and FASD are sometimes used interchangeably.[4] Ms. Holmes has been clinically diagnosed as having physical and organic brain changes, and cognitive and adaptive functioning deficits, consistent with those of FAS.

A diagnosis of FAS requires the presence of the following: 1) prenatal exposure to alcohol, 2) characteristic facial features demonstrating craniofacial anomalies (short palpebral fissures [smaller than normal eye openings], a smooth philtrum [ridges just above the middle of the upper lip] and a thin vermillion border of the upper lip), 3) prenatal or postnatal growth retardation, and 4) central nervous system dysfunction, commonly called "organic brain damage."[5]

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[2] *See* National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention, Department of Health and Human Services, *Fetal Alcohol Syndrome Guidelines for Referral and Diagnosis*, (July 2004).

[3] *Id.* at 1.

[4] *Id.*

[5] Timothy E. Moore, et al., *Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System*, 19 Criminal Reports 99-106 (July 2004).

It is undisputed that Ms. Holmes was exposed to large amounts of alcohol in utero from the earliest stages of fetal development and during all three trimesters of her mother's pregnancy. Tr. Feb. 16, 2006, 10:2-4, 17-19. Her mother testified that she drank heavily throughout her pregnancy, first brandy and then beer. Tr. Feb. 16, 2006, 10:17-11:14. In fact, she even named Ms. Holmes "Brandy" after her favorite drink. Tr. Feb. 16, 2006, 11:22-31.

Evidence presented at trial depicted Ms. Holmes as possessing facial features, a growth deficiency and deficits in cognitive and adaptive functioning, consistent with FAS. Tr. Feb. 16, 2006, 87:28-88:16. That her face exhibited FAS-related features was evident as she appeared sitting in the courtroom as a young adult. Tr. Feb. 16, 2006, 31:14-17. Expert testimony also documented Ms. Holmes' organic brain damage, deficits in her cognitive and adaptive functioning, and a mental health profile, all representative of FAS. Tr. Feb. 16, 2006, 30:20-28, 59:14-16, 60:18-19.

Most individuals with prenatal alcohol exposure are not mentally retarded within the accepted definition of that term, but they do typically fall well below the average range of intellectual functioning.[6] Moreover, deficits in adaptive functioning have been found to be more profound in individuals with FAS than deficits associated with IQ or other measures of academic performance.[7] As is typical of individuals

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[6] Blair Paley & Mary J. O'Connor, *Neurocognitive and Neurobehavioral Impairments in Individuals With Fetal Alcohol Spectrum Disorder: Recognition and Assessment*, 6 Int. J. Disabil. Hum. Dev. 127 142 (2007), at 129.

[7] Ann Streissguth, *The Importance of Adaptive Behavior Assessments for Understanding Fetal Alcohol Spectrum Disorders*

with FAS, Ms. Holmes has an IQ of 77, which is much lower than average. In school she was classified as learning disabled and speech impaired, with particular problems in reading, math, and communication. R. 674-695 (Caddo Parish School Board, school records). Her impairments included difficulties with both "visual and auditory processing and visual-motor integration." *Id.* Experts noted that she is "functioning . . . at the very lowest level of borderline intellectual ability." Tr. Feb. 16, 2006, 51:5-6.

To fully assess Ms. Holmes' FAS, her organic brain damage must be reviewed. Researchers studying the teratogenicity of ethanol, that is, the ability of ethanol (alcohol) to induce malformations in the developing fetus, have found that ethanol readily crosses the placenta and that blood alcohol levels in the fetus *equal those of the mother within minutes*, resulting in a reduction in brain cell growth and increased cell death.[8]

Clinical evaluation of Ms. Holmes' December 2005 and January 2006 brain imaging studies revealed abnormalities in the parts of the brain that ". . . are generally consistent with Fetal Alcohol Syndrome." R. 3683 (Expert Report). Particularly important are the brain anomalies in Ms. Holmes' cerebellum and basal ganglia that are associated with FAS.[9] The

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(FASD), 32 Psych. in Mental Retardation and Dev. Disabil. 5-6 (Fall 2006) at 6.

[8] Larry Burd, et al., *Recognition and Management of Fetal Alcohol Syndrome*, 25 Neurotoxicology and Teratology 681-688 (2003), at 682.

[9] Albert E. Chudley, et al., *Challenges of Diagnosis in Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder in the Adult*, 145C Amer. J. Med. Genetics, Part C, 261-272 (2007), at 267.

basal ganglia contain the brain circuitry necessary for higher cognitive functioning, including the inhibition of inappropriate behavior.[10] Taken together, abnormalities in these areas of the brain are associated with FAS and FAS, in turn, is associated with deficits in a set of adaptive behaviors.[11] Adaptive behavior or "adaptive functioning" is "the collection of conceptual, social and practical skills that have been learned by people to function in their everyday lives."[12] There are also well-documented deficits in adaptive functioning, characteristic of individuals with FAS, that are particularly relevant to Ms. Holmes' ability to understand the consequences of her actions and to show remorse. Manifestations of her disability are evident in her background, social history and the trial record. As one expert noted, "she has a history of abnormal behavior all of her life." Tr. Feb. 16, 2006, 60:18-19.

The National Center on Birth Defects and Developmental Disabilities considers adaptive functioning deficits related to FAS to be present when there are limitations in *three or more* functional domains:

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[10] Paley & O'Connor, *supra* note 6.

[11] Researchers also note that changes in the corpus callosum are associated with FAS, although changes in the corpus callosum were not detected in Ms. Holmes' MRI and PET scans. Radiologists at the University of Washington have developed special MRI programming designed to focus in more detail on the corpus callosum, a procedure that was not performed during Ms. Holmes's MRI scan. *See* Fred L. Bookstein et al., *Geometric Morphometrics of Corpus Callosum and Subcortical Structures in the Fetal-Alcohol-Affected Brain*, 64 Teratology 4-32 (2001) at 6.

[12] Marc J. Tasse, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 App. Neuropsychology 114-123 (2009), at 114.

(1) cognitive deficits; (2) executive functioning deficits; (3) motor function delays; (4) attention and hyperactivity problems; and (5) social skills problems.[13] Ms. Holmes has adaptive behavior deficits in *at least three* of these areas: cognitive, executive functioning and social skills. Tr. Feb. 16, 2006, 82:14 – 88:16. Ms. Holmes' neuropsychological test results also reflected brain damage for three of five major indices of neuropsychological dysfunction that showed the effects of her organic brain damage. Tr. Feb. 16, 2006, 29:27-31:6.

Ms. Holmes' cognitive deficits have been well documented. Her executive functioning and social skills deficits align with what researchers have summarized as the profile of individuals with FAS: "poor social judgment, trouble learning from experience, failure to consider the consequences of their actions, difficulty understanding social cues, indiscriminate social behavior and difficulty communicating in social contexts."[14] Research indicates that the social skills of children with FAS increasingly fall behind those of same-age peers as they develop and that by adulthood they are reported to have significant deficits in their social abilities.[15] Recent studies also suggest that moral development remains immature in individuals with FAS.[16]

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[13] National Center on Birth Defects and Developmental Disabilities, *supra* note 2, at 14-16.

[14] Amy Schonfeld, et al., *Moral Maturity and Delinquency After Prenatal Alcohol Exposure*, J of Studies on Alcohol, 545-554 (July 2005).

[15] Ann Streissguth et al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 Jour. Amer. Med. Ass'n 1961-67 (1991).

[16] Schonfeld, *supra* note 14.

Unrebutted testimony documented extensive evidence of Ms. Holmes' deficits in executive functioning, including poor organization, planning or strategy use, lack of inhibition, difficulty grasping cause and effect, and poor judgment. There also is evidence that Ms. Holmes had social skill problems, including being easily taken advantage of and difficulties understanding the perspective of others. Expert testimony was presented demonstrating that Ms. Holmes does not reason or foresee consequences like a normal adult. Tr. Feb. 16, 2006, 67:7-10. Ms. Holmes has a history of poor judgment and poor impulse control, as well as a juvenile and adult criminal history documenting a failure to conform to social norms. Her trouble with the law is a direct consequence of her impaired executive functioning, inability to conform to social norms and difficulty learning from past experience, all of which are characteristic of FAS.[17]

Individuals with FAS also have a high risk of mental health problems.[18] Ms. Holmes "has had multiple psychiatric diagnoses in the past, including various mood and anxiety disorders, learning disorders, conduct disorder, oppositional defiant disorder, and substance abuse." R. 3683 (Expert Report). In addition to major depression, Ms. Holmes dependency on alcohol and marijuana is also noted in the record. Tr. Feb. 16, 2006, 50: 7-14. Ms. Holmes has been diagnosed with depression, impulse control impairment, antisocial personality disorder and has a "long, long, long history of mental illness." Tr. Feb.

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[17] Chudley, *supra* note 9, at 268 (finding fetal alcohol disorders predictive of high risk for crimes, varying from theft to murder).

[18] *Id.* at 268.

16, 2006, 59: 14-16. "Considering her long legal history, diagnosis of conduct disorder and oppositional defiant disorder, an inability to appreciate the long term consequences of immediate actions would be predicted, and indeed, is a feature of Fetal Alcohol Syndrome." R. 3683 (Expert Report).

Conry and Fast's widely cited work found that fetal alcohol-related disorders are predictive of high risk for crime, varying from thefts to murder.[19] They found that individuals with FAS have problems in adaptive functioning, language, attention, reasoning and memory.[20] For example, individuals with FAS may have gaps in memory due to organic brain damage that make them prone to fill in missing memories with inaccurate details.[21] During legal proceedings, an individual with FAS may give a false confession or make a false statement and may not clearly remember details of time, place and sequence.[22] Evidence of all of these traits, associated with FAS, was presented at trial regarding Ms. Holmes' memory gaps and false or misleading statements to investigators.

The Louisiana Supreme Court had before it ample evidence in the record that Ms. Holmes has FAS, which resulted in organic brain damage, cognitive and adaptive functioning deficits (including executive functioning deficits and deficits in social skills), and

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[19] *Id.* (notably, trouble with the law started at a mean age of 12.8 years).

[20] J. Conry and D.K. Fast, *Fetal Alcohol Syndrome and the Criminal Justice System, The Law Foundation of British Columbia*, (2000).

[21] *Id.* at 3.

[22] *Id.* at 3.

mental health problems. The record before the Louisiana Supreme Court also demonstrates that these problems and deficits, resulting from her exposure to alcohol throughout her fetal development, had lifelong implications for her. Yet, the Louisiana Supreme Court did not consider any of this as mitigating circumstances in determining whether Ms. Holmes' death sentence is appropriate.

B. The Louisiana Supreme Court Failed To Adequately Consider Ms. Holmes' Disabilities Caused By Fetal Alcohol Syndrome, In Conjunction With Her Low IQ, When Determining Whether Her Death Sentence Is Appropriate.

In *Atkins v. Virginia,* 536 U.S. 304 (2002), this Court addressed the inappropriate application of the death penalty to vulnerable populations. Atkins suffered from severe disabilities in the areas of reasoning, judgment, and control of impulses, which are the same disabilities found in the instant case. Like Atkins, Ms. Holmes' mental deficiencies "do not warrant an exemption from criminal sanctions, but diminish [her] personal culpability." *Id.* at 320. Specifically, Ms. Holmes suffers from certain characteristics of mental retardation that this Court expressly found significant in *Atkins*: "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 317-318. The *Atkins* Court held that the execution of a person with such characteristics would "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.* Although Ms. Holmes does not have an

IQ that would classify her as "mentally retarded," she exhibits the same type of diminished capacity and culpability due to FAS as does the person with mental retardation addressed in *Atkins*.

A brief review of *Atkins* is necessary to conduct a proper analysis of Ms. Holmes' case: Mr. Atkins was twice sentenced to the death penalty stemming from an ATM robbery. *Id.* at 308-310. In the first sentencing phase, the defense called a psychologist, who testified that Atkins was "mildly mentally retarded," with an IQ of 59. That sentence was set aside for reasons not relevant to the case at bar. At the rehearing for sentencing, the state called a rebuttal witness who testified that Mr. Atkins was not retarded, that he was "of average intelligence, at least," and that the appropriate diagnosis was antisocial personality disorder. The jury again sentenced Akins to death, and this sentence was affirmed by the Virginia Supreme Court. It is of particular note that a dissent at the State Supreme Court level argued that the imposition of the death sentence on one "with the mental age of a child between the ages of 9 and 12 [was] excessive," and that the state's expert's testimony was "incredulous as a matter of law." *Id.* This Court ultimately agreed with the dissent and reversed Mr. Atkins' death sentence. Notably, in this case, testing indicated that Ms. Holmes was functioning in the 4th-7th grade level academically and intellectually, and that Ms. Holmes functions like a 10-12 year-old. *See* Tr. Nov. 10. 2005, 21:3-4; Tr. Nov. 10, 2005, 37:14-18.

In *Atkins*, this Court held that mental retardation involves "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction

that became manifest before age 18." 536 U.S. at 317-318. In *Atkins*, this Court further determined that an IQ of 75 is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.* at 309. In doing so, this Court tried to draw a line of what "shocks the conscience" in a capital case involving a person with mental retardation. The concept of FAS has never undergone this type of analysis, although individuals with FAS lack the intellectual and adaptive functioning necessary to justify their execution.

In *Atkins*, this Court addressed the drastic change in society's view of the execution of the mentally retarded. At the time of this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), only two states had banned the execution of persons with mental retardation. In the thirteen years from *Penry* to *Atkins*, the federal government and at least sixteen additional states had banned the execution of mentally retarded individuals, leading this Court to the following conclusion:

> It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that

> have addressed the issue have voted overwhelmingly in favor of the prohibition. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

Atkins, 536 U.S. at 315-316. With respect to FAS, those who suffer from it also may be "so impaired as to fall within the range of . . . offenders about whom there is a national consensus." *Id.* at 309.

Here, Ms. Holmes suffers from a myriad of cognitive and adaptive functioning deficits as well as mental health issues, organic brain damage, significant brain dysfunction in several areas, learning disabilities, alcohol and drug dependence, and borderline mentally retarded intellectual functioning. Prior to trial and at trial, a psychiatrist testified that Ms. Holmes suffers from FAS. Moreover, the prosecution conceded Ms. Holmes suffers from FAS. Neuropsychological testing revealed that Ms. Holmes has a moderate degree of organic brain dysfunction, primarily to the left side of her brain. There was further testimony that a pre-trial MRI and PET Scan revealed significant abnormalities in several areas of her brain, all consistent with FAS. Every expert that evaluated Ms. Holmes placed her intellectual functioning at the borderline mentally retarded level with a full scale IQ in the 74 - 77 range. Despite the trial record's clear showing that Ms. Holmes suffers from FAS and has a low IQ, she was still sentenced to death because such facts were characterized by the prosecution as aggravating evidence, and the Louisiana Supreme Court failed to consider that evidence during its proportionality review.

Courts have recognized the substantial impact of FAS when viewed as a mitigating factor. In *State v.*

Haberstroh, 119 Nev. 173 (2003), the Nevada Supreme Court held that it was prejudicial error to exclude certain mitigating evidence, including evidence that the defendant suffered from fetal alcohol syndrome, mild neuropsychological impairment, and a low average IQ. *See also, Castro v. Oklahoma,* 71 F.3d 1502, 1516 (10th Cir. 1995) ("We conclude that the facts and circumstances of [defendant's] crime, coupled with a more complete picture of his mental health, [including FAS], likely would have changed the jury's intuitive calculus.").

Most states permit proof of intoxication or other conditions to show a lack of specific criminal intent. In *Dillbeck v. State*, 643 So.2d 1027 (Fla. 1994), the court made clear that the disabilities caused by FAS, unlike those resulting from intoxication, are beyond the capacity of the affected individual to prevent:

> Evidence concerning alcohol-related conditions has long been admissible during the guilt phase of criminal proceedings to show lack of specific intent. . . Just as the harmful effect of alcohol on the mature brain of an adult imbiber is a matter within the common understanding, so too is the detrimental effect of this intoxicant on the delicate, evolving brain of a fetus held in utero. As with 'epilepsy, infancy, or senility,' . . . we can envision few things more certainly beyond one's control than the drinking habits of a parent prior to one's birth. We perceive no significant legal distinction between the condition of epilepsy . . . and that of alcohol-related brain damage in issue here—both are specific, commonly recognized conditions that are beyond one's control.

Id. at 1028-1029. *See also, State v. Rose,* 339 N.C. 172 (1994) (holding that FAS arises from circumstances

entirely beyond the individual's control). Although Ms. Holmes' prenatal exposure to alcohol, at fetal blood levels equal to that of her intoxicated mother, was likewise beyond her capacity to prevent, she now suffers the lifelong aftereffects of that maternal intoxication. Due to FAS, Ms. Holmes does not have the capacity to appreciate the criminality of her conduct or to conform her actions to the requirements of the law.

Significantly, the dissenting opinion in the Louisiana Supreme Court addressed evidence demonstrating that Ms. Holmes was mentally retarded under Louisiana law, and found it "error to relegate to post-conviction relief the pivotal issue of whether the defendant is mentally retarded and thus exempt from execution. . ." The dissent highlights the error committed by the Louisiana Supreme Court in failing to consider FAS in its proportionality review. If the Louisiana Supreme Court had considered FAS during its proportionality review, it would have recognized that the death penalty, in this case, does not serve a legitimate societal purpose.

As this Court explained in *Atkins*, retribution and deterrence are the only two social purposes that justify the imposition of the death penalty: "Unless the imposition of the death penalty. . . 'measurably contributes to one or both of these goals [of retribution and deterrence], it is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Atkins*, 536 U.S. at 319. (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982). Looking to the characteristic disabilities of persons with mental retardation, the Court concluded that "the lesser culpability of the mentally retarded offender surely does not merit

[death as] retribution." *Id.* In *Atkins*, this Court likewise found that the purpose of deterrence would not be served by executing the mentally retarded given that their very limitations preclude thoughtful behavior in response to the law that those guilty of the most depraved murders will be sentenced to death. *Id.* at 319-320. Further, in *Penry*, Justice Brennan (for himself and Justice Marshall), in partial dissent, argued that the execution of an individual with mental retardation neither furthers the punishment aims of deterrence nor of retribution. Since such individuals lack the requisite culpability, execution can never be a 'just desert' for a retarded offender." *Penry*, 492 U.S. at 348 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982). Here, because of FAS, the execution of Ms. Holmes would fail to serve any legitimate societal purpose. Neither the goal of retribution nor of deterrence would be served by her execution.

This Court also noted in *Atkins* that the exemption of the mentally retarded from execution serves other legitimate ends of the criminal justice system – due process and the enhanced reliability necessary in capital sentencing proceedings:

> Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defen-

dants in the aggregate face a special risk of wrongful execution.

Id. at 320-21 (citing *Penry v. Lynaugh*, 492 U.S. at 323-25 (internal citations omitted)). In Ms. Holmes' case, both experts testified as to the limitations in her ability to give meaningful assistance to counsel, to testify, and the risk that her demeanor would be interpreted as a lack of remorse. Tr. Nov. 10, 2005, 55:13–29. As such, no legitimate social goals will be met by the execution of Ms. Holmes.

C. The Portrayal Of The Behavioral Manifestations Of Fetal Alcohol Syndrome As Aggravating Circumstances Precluded A Consideration Of Fetal Alcohol Syndrome As A Mitigating Circumstance In Determining Whether Ms. Holmes' Death Sentence Is Appropriate.

Ms. Holmes' behavioral characteristics, such as violence, lack of empathy, and inability to care are classic manifestations of FAS. Her diagnosis of FAS is an explanation that the Louisiana Supreme Court should have taken into account as a mitigating circumstance in its review of her death sentence. The National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention (CDC), states that the deficits in executive functioning and social skills of individuals with FAS "*demand* that when they do encounter the justice system, their deficits should be taken into account during all aspects of justice proceedings (*i.e.*, charges, process, punishment, and rehabilitation."[23] This is

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[23] National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention, *supra* note 2, at 27 (emphasis added).

precisely what the Louisiana Supreme Court did not do in its review of Ms. Holmes' death sentence. The trial court allowed the State to manipulate these disabilities into aggravating factors, thus creating an impossible hurdle for Ms. Holmes to overcome, as this Court feared would happen to those with disabilities in the areas of reasoning, judgment, and impulse control. *See Atkins*, 536 U.S. at 304. The record is replete with examples of the State's exploitation of Ms. Holmes' disabilities.

Thus, in the State's closing argument during the sentencing phase, the prosecutor, Mr. O'Callaghan, while admitting that Ms. Holmes' mother drank alcohol while pregnant, stated that this is "not only not an excuse, it doesn't mitigate anything." Tr. Feb. 16, 2006, 152: 17-18. Similarly, during the trial and sentencing phases, the State made much of Ms. Holmes' apparent lack of remorse for her actions, thereby misconstruing the fact that individuals with FAS are often unable to make connections between cause and effect, anticipate consequences or fully comprehend another person's perspective. Thus, the prosecutor undercut the testimony of one FAS expert by misconstruing Ms. Holmes' FAS disabilities as aggravating factors:

> So what does Dr. Vigan's testimony ultimately mean? It means that in deciding whether or not Brandy Holmes deserves to receive the death penalty, you should consider that she is violent, that she is deceitful, that she tries to stay outside of the rules and opposes any authority above her. That is what you should consider from Dr. Vigan's testimony.

Id. at 154:15-20. Further presenting Ms. Holmes' deficits in adaptive functioning as aggravating,

Mr. O'Callaghan stated: "What you've heard is that she's always hurt other people, that she doesn't have empathy, that she doesn't care for others." *Id.* at 158: 22-24. The State's presentation of these factors as aggravating, the trial court's failure to prevent this prejudice by giving a proper charge to the jury, and the Louisiana Supreme Court's failure to consider this issue, all violate the policy underlying this Court's decision in *Atkins*.

The trial court, as well as the Louisiana Supreme Court, disregarded the fact that this failure to understand cause and effect, known to be associated with FAS, may explain Ms. Holmes' inability to express remorse. This issue should have been presented in a fair and just manner to the jury but it was not, and the Louisiana Supreme Court failed to address this failure in its proportionality review.

Finally, all defense challenges to potential jurors on the grounds that the juror would not consider FAS as a mitigating factor were denied by the trial court. However, at least one potential juror was excused for cause "[b]ecause in my mind just from observing, looks like to me there might be a lack of capacity for that particular defendant." R. 5262. Thus, the defense was stymied in its efforts to present FAS as a mitigating factor.

Most critically, the Louisiana Supreme Court's failure to recognize, or even discuss this issue in its proportionality review on appeal prevented Ms. Holmes from obtaining a just and equitable review of her death sentence. Therefore, this Court's review is imperative to ensure that Ms. Holmes does not fall into the trap Justice Stevens feared in *Atkins* where she is cut in the criminal justice system by the double-edged sword. 536 U.S. at 321.

CONCLUSION

Ms. Holmes death sentence is a prime example of jeopardizing the reliability and fairness of capital proceedings, a result this Court sought to avoid in *Atkins*. Ms. Holmes' significant impairments in reasoning, judgment, and impulse control, attributable to FAS and her low IQ, render her death sentence cruel and unusual punishment. Therefore, this Court should accept the petition for a writ of certiorari to review the Louisiana Supreme Court's judgment in this case.

Respectfully submitted,

HARRY R. SILVER
Counsel of Record
KAREN SMITH THIEL
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6453

DAINA BORTECK
AMY GLUCK
SHEEA SYBBLIS
PATTON BOGGS LLP
The Legal Center
One Riverfront Plaza
Newark, NJ 07102
(973) 848-5600

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